# Lim Yoon Loy & Ors v Lee Lan

HIGH COURT (IPOH) — CIVIL APPEAL NO 5 OF 1984
ABDUL MALEK J
21 MARCH 1990

*Civil Procedure — Notice of appeal — Service of — Whether parties were aware of the appeal — Purpose of service — Time for effecting service — Rules of the High Court 1980, O 2 & O 3 — Rules of the Subordinate Courts 1980, O 49*

The respondent filed an action against the appellants in the subordinate courts and obtained judgment on 25 January 1984. The appellants immediately filed an appeal and applied for a stay of execution of the judgment. The notice of appeal was never served on the respondent or her solicitors, but it was attached to the motion by which the appellants applied for a stay and this was served on the respondent's solicitors. The appellants applied for an extension of time to serve the notice of appeal.

**Held,** allowing the appellants' application:

(1) The respondent was aware of the appeal as she had opposed the application to stay execution of the judgment pending the disposal of the appeal and made no objection to the non-service of the notice. The primary purpose of service of a notice of appeal is to inform the respondent of the appeal.

(2) Order 49 of the Rules of the Subordinate Courts 1980 does not prescribe a time limit for the service of the notice and therefore the notice should be served within a reasonable time.

(3) The non-service was only an irregularity under O 2 of the Rules of the High Court 1980 and the court had an unfettered discretion under O 3 to extend time.

(4) The application for extension of time was rightly made by way of summons-in-chambers and not by notice of motion in the light of O 3 r 5 of the Rules of the High Court 1980.

(5) The service of the photocopy of the notice of appeal vide the application for a stay was sufficient notice on the respondent.

[*Editorial Note*: The respondent has appealed to the Supreme Court vide Civil Appeal No 04-6-90.]

**Cases referred to**

1 *Liew Chee Tat* v *Lok Moon & Ors* [1972] 2 MLJ 29 (distd)
2 *Cheah Teong Tat* v *Ho Gee Seng & Ors* [1975] 2 MLJ 149 (distd)

**Legislation referred to**

Rules of the High Court 1980 O 2, O 3, O 5
Rules of the Subordinate Courts 1980 O 49

*Gurbachan Singh* for the appellants.
*SN Leow* (*VS Viswanathan* with him) for the respondent.

*Cur Adv Vult*

**Abdul Malek J**: By summons-in-chambers filed on 22 December 1989 upon a certificate of urgency, the appellants, who were the defendants in Tapah Magistrate's Court Summons 18/82, had applied for an interim stay of execution of the judgment in the Tapah case on 25 January 1984 and an extension of one week from the date of the order to pay $250 for the costs of the preparation of the appeal record. By another summons-in-chambers filed on 23 January 1990, the appellants had applied for an order that they be given an extension of time to serve the notice of appeal on the respondent or her solicitors. Learned counsel for the appellants had then intimated to the court that in view of the circumstances, they were proceeding only on the second application.

Going back to the history of the matter, the respondent had filed an action against the appellants for delivery of vacant possession and obtained judgment on 25 January 1984. The appellants had immediately filed a notice of appeal against that decision. Stay of execution was granted by the High Court on 29 June 1984 upon the application by way of notice of motion dated 5 June 1984 following the dismissal of the same application by the Tapah magistrate on 15 February 1984. The appellants had in the mean time changed solicitors on 21 May 1984. By letter dated 12 July 1989, the Tapah magistrate had written to learned counsel for the appellants asking them to pay $250 for the deposit for the appeal. This was copied to learned counsel for the respondent.

Learned counsel for the appellants wrote to the first appellant by registered letter dated 17 July 1989 requesting them to deposit the $250 into court. However, this letter never reached the first appellant. By letter dated 15 September 1989, the Tapah magistrate wrote again to learned counsel for the appellants asking them to pay the $250 plus another $180.40 for costs of preparing the appeal record. The first appellant was not aware of this letter as he was in Kuala Lumpur and only became aware when he opened the letter on his return to Tapah at the end of November 1989. By that time, the Tapah magistrate had already notified learned counsel for the appellants that the appeal was deemed to be cancelled as the $250 had not been paid. Consequently, learned counsel for the respondent wrote to learned counsel for the appellants by letter dated 4 December 1989 demanding compliance with the judgment on 25 January 1984 within 14 days.

Learned counsel for the appellants then wrote to the appellants by letter dated 14 December 1989 to ask them to deliver vacant possession. Upon receipt of that letter on 18 December 1989, he first appellant immediately deposited the $250 with his solicitors. This was followed by the two applications now before the court.

The only issue, to my mind, was whether the notice of appeal dated 25 January 1984 attached to the notice of motion applying to the High Court for a stay of execution pending appeal served on the respondent on 20 June 1984, which order was given on 29 June 1984, could be regarded as service on the respondent.

Order 49 r 3 of the Rules of the Subordinate Courts 1980 (hereinafter 'the SCR') clearly states that the notice of appeal shall be filed within 14 days from the day on

which the decision was pronounced. As the decision in the Tapah case was on 25 January 1984, the last date for filing the notice of appeal would have been 8 February 1984. The notice of appeal was in fact filed on the date of the decision and an application for stay was made. This was heard on 15 February 1984 before the Tapah magistrate who refused it.

By letter dated 28 February 1984, the learned senior assistant registrar of the Ipoh High Court had written to learned counsel for both the appellants and the respondent with a copy to the Tapah magistrate informing them that the notice of appeal had been filed in the matter and the Ipoh High Court had given it a number. By letter dated 29 February 1984, the Tapah magistrate had written to the learned senior assistant registrar of the Ipoh High Court, copied to counsel for both parties, enclosing the notice of appeal and stating that the decision had been given on 21 February 1984 and that the notice of appeal had been filed on 29 February 1984. At first glance, it is apparent from the dates that the latter letter should have been sent before the former following the sequence of time and events and that the date of decision and filing of the notice of appeal should have been 25 January 1984 for both and not 21 February 1984 and 29 February 1984 respectively. In any case, despite this unexplained mix up of dates, it is clear that there had been a notice of appeal filed in the Ipoh High Court in time in the matter and that both parties were aware of the appeal by virtue of the Ipoh High Court letter.

On 21 May 1984, the appellants changed solicitors and their new counsel had filed a notice of motion in the High Court applying that execution on the judgment be stayed pending the disposal of the appeal. This was allowed on 29 June 1984. Since both parties were represented for the arguments, there is again no doubt that an appeal was pending and that the respondent was well aware of it.

In the circumstances, my view was that no one should be blamed for the non-service of the notice of appeal on the respondent. It had been filed on the same day and an application for stay of execution had been heard twice, the first before the Tapah magistrate on 15 February 1984 and the second before the Ipoh High Court on 29 June 1984. The Ipoh High Court had also written to both parties on 28 February 1984 as regards the fact of the filing of the notice of appeal. The learned present counsel for the appellants had only taken over the matter on 21 May 1984 and despite being ignorant of the service of the notice of appeal then, had now readily admitted the mistake and was willing to pay costs should the extension of time for service be given. It is pertinent to point out that in fact learned counsel for the appellants were not aware of this oversight when the appellants filed their first summons-in-chambers on 22 December 1989 and became aware only through the affidavit-in-reply of the respondent. Hence the second application by them which was filed on 23 January 1990.

I had been referred to two authorities relating to the same issues, namely, *Liew Chee Tat* v *Lok Moon & Ors*[1] and *Cheah Teong Tat* v *Ho Gee Seng & Ors*.[2] However, my view is that the facts there are distinguishable from this situation. In the first case, no application or attempt had been made to urge the court to excuse the delay or to extend the time to effect service or to correct the position. The court had, accordingly and to my mind rightly, dismissed the appeal purely upon the preliminary objection that there had been no service of the notice of appeal as the appealing party was reluctant to admit their mistake. In the second case, the Federal Court ruled by a majority of one that the High Court was right in finding that no case had been made out for the grant of the extension of time to serve the notice of appeal. There, the judgment had been given on 6 May 1972 in the sessions court and the notice of appeal filed on 11 May 1972 but not served. Only after receiving the notes of evidence and the grounds of decision did the appellant serve a copy of the notice of appeal on the respondent's solicitors on 6 July 1972. However, in that case, there had been no application for stay of execution pending appeal and the respondent was totally ignorant as to the fact of the appeal. Here, the respondent had been made aware of the appeal all along.

In the circumstances of the present case, I had consequently allowed the appellants an extension of time to serve the notice of appeal on the respondent or her solicitors to 20 June 1984, which was the date when a photocopy of the notice of appeal was exhibited to the notice for the application for the stay of execution pending the appeal was served on the respondent, subject to the appellants paying costs. My reasons are:

(a) the notice of appeal against the decision of the Tapah magistrate on 25 January 1984 had been filed on the same day;

(b) both the Tapah magistrate and the Ipoh High Court had informed the parties of the appeal on 29 and 28 February 1984 respectively;

(c) there had been two applications for stay of execution pending the appeal before the Tapah magistrate on 15 February 1984 when it was refused and before the Ipoh High Court on 29 June 1984 when it was allowed;

(d) the respondent was aware of the appeal all along and had made no objections to the fact that the notice had not been served on her or her solicitors even at the arguments for the stay on both occasions;

(e) the primary purpose of the service of the notice of appeal is to inform the respondent party but here the

respondent was aware of the appeal even without being served with the notice of appeal;

(f) O 49 r 2(6) of the SCR does not prescribe a time limit for the service of the notice of appeal and so it can only be interpreted as meaning that it should be served within a reasonable time;

(g) the case authorities that had decided on this issue are where the facts indicate that the respondent was totally unaware of the appeal in the first place until at a late stage whereas here the respondent had been informed of the appeal about a month after the decision by the Ipoh High Court and she had not raised any objections to the non-service even at the second application for the stay of the execution in the High Court on 29 June 1984 when the copy of the notice was exhibited to the notice of motion;

(h) in any case, the non-service of the notice of appeal was an irregularity under O 2 r 1(1) of the Rules of the High Court 1980 (hereinafter 'the RHC') and the court had the unfettered discretion under O 3 r 5 of the RHC to extend the time.

The respondent had, after my decision, changed solicitors to apply for leave to appeal as the subject matter was less than $100,000 and because there were several questions of law, namely:

(a) whether an application for extension of time should be before the magistrate or the appeal court;

(b) whether the application should be by way of notice of motion and not by way of summons-in-chambers;

(c) whether enclosing a notice of appeal by way of exhibit amounts in law to service of the notice on the respondent;

(d) whether the long lapse of time from 25 January 1984 to 20 June 1984 is a reasonable period; and

(e) whether the solicitor's mistake can be a good ground.

As regards point (a), since no time limit is stated for service of the notice of appeal, the question does not arise for the magistrate and my view is that it is within the power of the High Court to extend the time, if applied for or otherwise, under O 3 r 5 of the RHC. Point (b) is purely procedural but my opinion is that, in view of the nature of the application, if brought in the High Court, it had correctly been made vide a summons-in-chambers and not by notice of motion in the light of O 5 r 3 of the RHC. Even if this opinion is in error, any wrong procedure taken is a curable irregularity. As for points (c), (d) and (e), my decision had implied that the service of the photocopy of the notice of appeal vide the application for stay on 29 June 1984 was sufficient notice on the respondent and that a four-month delay and the new solicitor's oversight were excusable in the circumstances. Despite these, I felt that this was a good case to get a ruling from the Supreme Court and granted the respondent leave to appeal without making any order as to costs.

*Application allowed.*

Solicitors: *Bachan & Kartar; Kean Chye & Sivalingam.*

Reported by *Mathavan Devadas*

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## Public Prosecutor v Ng Lai Huat & Ors

HIGH COURT (KUALA LUMPUR) — FEDERAL TERRITORY CRIMINAL TRIAL NO CR 56-1-87
FAIZA TAMBY CHIK JC
16 MARCH 1990

*Evidence — Hearsay — Applicability of the rule against hearsay evidence — Evidence Act 1950, s 10*

*Criminal Law — Kidnapping — Ransom — Kidnapping Act 1961, s 3*

The five accused were charged with kidnapping and the sole question that fell to be decided by the court was whether they detained the victims with the intention of holding them to ransom. The principal prosecution's evidence was the testimony of the former Director of Prisons that he spoke to one of the accused, Jimmy Chua, who demanded, inter alia, that the accused persons be freed and given a getaway car.

**Held,** convicting the accused on amended charges:

(1) The general rule is that hearsay evidence is not admissible as proof of a fact which has been stated by a third person. This rule does not apply where the purpose of adducing the evidence is to show not the truth of what was said but that the statement was in fact made.

(2) In the present case, the purpose of introducing the utterances of Jimmy Chua was to show that a ransom was demanded by the accused persons. These utterances were hearsay and inadmissible as their purpose was to establish the truth of those utterances.

(3) That being the case, the remainder of the prosecution's evidence was insufficient to sustain the charges of kidnapping as the essential ingredient of a ransom having been demanded was absent. However, the court being satisfied that the accused persons were involved in the abduction and wrongful confinement of the victims, amended the charges accordingly.

**Cases referred to**

1 *Subramaniam* v *PP* [1956] MLJ 220 (folld)
2 *Teper* v *R* [1952] 2 All ER 447 (refd)
3 *Myers* v *DPP* [1964] 2 All ER 881 (folld)
4 *Ratten* v *R* [1972] AC 378 (folld)